

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

The claimant testified she was employed for about eight months by Windsor Place which is located in Coffeyville, Kansas. Claimant provided home health care such as bathing, dressing, feeding, cooking and cleaning to individuals in their homes. She had completed an application for employment with respondent when she began her employment. Claimant received her paycheck from Windsor Place which also had payroll deductions taken out of her check. Those deductions included state and federal income tax as well as FICA and Medicare.

She was assigned to provide home health care for a man who had leukemia, lymphoma, Crohn's disease as well as a back injury which rendered him virtually immobile. She typically worked during the day but would occasionally stay for a night shift to cover for the lady that normally worked the night shift.

On August 16th through August 17, 2009, claimant was working a night shift from 10 p.m. to 6 a.m. She described her accident as follows:

Well, he had quit taking his medications and I had noticed a couple of weeks before and even the lady that works the night shift had noticed that he had been acting out of, just different, but anyway, he was an alcoholic and he drank a lot and he was being belligerent and just mistreating me, like not acting right and I told him I was going to leave.

So I was getting ready to leave and he said let me help you out, and he always kept a 2 x 4 in front of his door and he went over to the door and he said let me help you out and I had my back turned because I don't know, picking up my purse and belongings, and when I turned around he had the 2 x 4 and he hit me in the face and then he kept hitting me in the face. I don't know how many times, I would say between five to eight times. I don't know because I didn't, you know, I mean it was a hard blow to my head, so that's basically what happened.¹

Claimant called her daughter and the police arrived at the home. Claimant was then transported by ambulance to Coffeyville Regional Medical Center for treatment. X-rays were taken as well as a CT of the head. Dr. Anand Balson diagnosed claimant as having bilateral maxillary fractures. Claimant admitted that in the days before the incident she had used marijuana and methamphetamines. A drug screen conducted at the hospital was positive for those drugs.

Claimant was transferred by ambulance to St. John's Hospital in Joplin, Missouri. Dr. Oscar Gonzales was claimant's attending physician. Medications were prescribed and tests performed. Dr. Gonzales referred claimant to a surgeon, Dr. Matthew Schaefer. She was discharged on August 20, 2009, and it was recommended that she follow-up with Dr.

¹ P.H. Trans. at 13-14.

Schaefer. Claimant returned only for one follow-up visit due to not having medical coverage in Missouri.

On September 30, 2009, claimant was evaluated by Four County Mental Health Center. Claimant is seen by a counselor every three weeks and a doctor for medications. She is currently having headaches, double vision and breathing issues.

Initially, respondent argues that claimant was not an employee. It should be noted that it was claimant's uncontroverted testimony that she was respondent's employee.

The primary test used by courts in determining whether the employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be performed, as well as the result that is to be accomplished. It is not the actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control that renders one a servant rather than an independent contractor.²

In addition to the right to control and the right to discharge the worker, other commonly recognized tests of the independent contractor relationship are:

1. The existence of a contract to perform a certain piece of work at a fixed price;
2. The independent nature of the worker's business or distinct calling;
3. The employment of assistants and the right to supervise their activities;
4. The worker's obligation to furnish tools, supplies and materials;
5. The worker's right to control the progress of the work;
6. The length of time that the worker is employed;
7. Whether the worker is paid by time or by the job; and
8. Whether the work is part of the regular business of the employer.³

² *Id.* at 102-103.

³ *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

Claimant filled out an application for employment with respondent and she was told by respondent her hourly rate of pay. Claimant was required to turn in time sheets which detailed the tasks she had performed as well as the time spent. Her pay rate was set by respondent and her paycheck was provided by respondent weekly with the appropriate taxes withheld. The type of service being provided by claimant was a part of respondent's regular business. Based upon the record compiled to date, this Board Member finds that claimant was an employee of respondent.

The next issue is whether claimant suffered accidental injury arising out of and in the course of her employment. Respondent listed that issue in its application for review by the Board but did not argue that issue in its brief to the Board. In any event, based upon claimant's testimony and the evidence compiled to date, it is clear that claimant was injured due to the incident that arose out of and in the course of her employment.

Respondent further argues that claimant's use of drugs is a defense to her claim. This Board Member disagrees. K.S.A. 44-501(d)(2) provides in pertinent part: "The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of alcohol or any drugs, chemicals or any other compounds or substances," The statute also has specific requirements before drug tests can be used and suffice it to say those requirements were not established in this proceeding. Furthermore, in this case, claimant admitted she had used drugs several days before the incident and the hospital screening test was positive for marijuana and methamphetamines. But there is no indication that her injury, suffered when she was struck by a 2 by 4, was contributed to by the use of drugs. Respondent did not meet its burden of proof to establish that her injury was contributed to by the use of drugs.

Lastly, respondent argues the ALJ erred by awarding claimant medical treatment and temporary total disability compensation. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?
3. Did the worker provide timely notice and written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?⁴

⁴ K.S.A. 44-534a(a)(2).

The Board does not take jurisdiction over an ALJ's determination of a need for medical treatment or the entitlement to temporary total disability compensation from an appeal of a preliminary decision. Respondent's appeal of these issues is dismissed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁶

WHEREFORE, it is the finding of this Board Member that the Order and Nunc Pro Tunc of Administrative Law Judge Thomas Klein dated December 1, 2009, is affirmed.

IT IS SO ORDERED.

Dated this 26th day of February 2010.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: E.L. Lee Kinch, Attorney for Claimant
Bart E. Eisfelder, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

⁵ K.S.A. 44-534a.

⁶ K.S.A. 2009 Supp. 44-555c(k).